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JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2031

In The

Supreme Court of the United States

October Term, 1988

UNITED STATES OF AMERICA,
Petitioners,

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL,
Respondents,

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE NATIONAL COMMITTEES OF THE LIBERTARIAN PARTY AND THE NEW ALLIANCE PARTY, AS AMICI CURIAE, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Court of Appeals correctly decided that the First Amendment prohibits the Government from forbidding any political advocacy on the access sidewalk in front of the Bowie, Maryland, Post Office.

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**Brief of the
LIBERTARIAN PARTY and the NEW ALLIANCE PARTY
as Amici Curiae**

INTEREST OF THE AMICI

The amici are the national committees of two political parties, the Libertarian Party and the New Alliance Party, which have sought

ballot access in both federal and state elections across the nation. In the 1988 presidential election, the Libertarian Party obtained ballot position for its presidential candidate in 46 states and the District of Columbia and the New Alliance Party obtained ballot position for its candidate in all 50 states and the District of Columbia. Both parties have petitioned extensively for ballot status and have petitioned at post offices.

The purpose of this brief is to alert the Court to the impact of this case as it applies to petitioning for ballot access and to urge affirmance. Reversal would tend to limit further the access to areas in which effective political petitioning is permitted so as to infringe seriously on the First Amendment right to participate meaningfully in the political process.

ARGUMENT

The Amici urge the Court to adopt the method of review articulated in Anderson v. Celebrezze, 460 U.S. 780, 75 L.Ed.2d 547 (1983), for judging constitutional challenges to laws alleged to impede political advocacy:

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. (460 U.S. at 789, 75 L.Ed.2d at 558.)

It is clear that the Respondents were prosecuted and convicted for engaging in acts which can only be described as political advocacy. The Government does not deny this,

but simply asserts that the protected activity can be barred from the access sidewalk leading up to the post office from the parking area and be confined to the sidewalk next to the public highway. Why? They ask this Court to distinguish between the sidewalks by finding that one (the sidewalk along State Highway 197) is traditionally a "public forum" and that the other is not. The amici urge the Court to recognize the enormous value of the free exercise of political advocacy and to impose the highest standards to justify the proposed government restrictions. [1]

This case should be analyzed in the context of contemporary America. To hold that the First Amendment protects only the right to engage in political advocacy on the Village Green would be a cruel erosion of our freedom.

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1 The amici would not oppose properly tailored, and content neutral, time, place and manner regulations on the use of the access sidewalk.

We Americans today usually travel by bus and automobile. We shop in privately owned Malls. If the post office has a parking area, we only exit our cars to walk from the parking area to the post office. Soon we may purchase stamps at drive-in windows and with home computers. Appropriate places available for face-to-face political advocacy are rapidly diminishing.

One might argue that in Twenty First Century America, political advocacy will have to be conducted through the media, much as modern marketing advocacy is done. Yet this Court continues to uphold state laws requiring that independent candidates and new political parties must demonstrate a "modicum of support" by obtaining the signatures of numerous voters. [2] Virtually all states

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2 Jenness v. Fortson, 403 U.S. 431, 29 L.Ed.2d 554 (1971); Storer v. Brown, 415 U.S. 724, 39 L.Ed.2d 714 (1974); American Party of Texas v. White, 415 U.S. 767, 39 L.Ed.2d 744 (1974).

have adopted such requirements. [3] Mass media techniques are useless to obtain the requisite signatures for ballot access, because one must petition voters directly and this requires personal contact. Modern communication techniques, such as computer bulletin boards, telephone solicitations or fax communications, can not be alternatives. Face-to-face political advocacy is essential; one must find and confront the voters on foot, normally in public places. [4]

This Court has held that mall owners can prohibit petitioning in the modern market

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3 Appendix A is a list of the states showing the election code references and the number of signatures that will be required in 1990 for a new party candidate for United States Senator. Appendix B is a similar list for independent candidates for United States Senator.

4 Door-to-door petitioning in many areas is difficult and may be considered more intrusive to privacy than confrontation in public.

place. [5][6] If the government also can prohibit petitioning on the sidewalks used to gain access to the post offices (with logic that could be applied to other state and federal offices), where are advocates of alternative politics expected to go? To sports and concert arenas? To mass transit depots? To community college campuses? To church parking lots? Are these traditional public fora? Will a cross-section of the community be found there? [7]

Should the Court choose to approach this case as one requiring a determination of

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5 Hudgens v. NLRB, 424 U.S. 507, 47 L.Ed. 2d 196 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551, 33 L.Ed.2d 131 (1972).

6 These "private" agoras were developed with state incentives, such as the Prince Georges County Zoning Code Sec. 27-549, et seq., which require all new buildings to have off-street parking.

7 Candidates for Mayor of Bowie will find no arena nor mass transit depot.

whether or not the Respondents were exercising their First Amendment rights in a "public forum", the amici urge the Court to reject the proposition that a distinction can be made between the various sidewalks in the vicinity of the post office. [8] The post office, as a federal symbol, is, itself, a public forum and the right to engage in political advocacy in the vicinity of the post office should be protected from undue interference. In the free market place of ideas, the vendor should be allowed to select which part of the market is best suited to her or his message. [9]

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8 On 12/18/89 the author noted that the access sidewalk on which the Respondents were arrested at the Bowie post office had been shovelled and salted, while the so-called "public forum" sidewalk was still covered with snow from the storm of the preceding week.

9 Petitioning on the snow covered, pedestrianless "public forum" sidewalk would be as useless as petitioning in a national forest.

In most towns, the post office is the only federal facility. It represents federal presence and can be a logical focal point for demonstrations for or against federal policies. [10] The post office has also become a symbol of federal protection in some contexts. It is the place chosen by the FBI to notify the community of the identity of persons wanted by federal authorities. In Selma, Alabama, in the mid-1960's, the presence of the federal post office had immeasurable symbolic significance. One will never know whether the long lines of voter

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10 The Military Selective Service Act (50 USCS Appx S 453) provides that all male residents of the United States between the ages of 18 and 26 must register at the post office (45 Fed. Reg. 45247). Anyone wishing to reach these young potential voters or to protest the selective service system might find that the post offices are effective places to engage in political advocacy.

applicants outside the Dallas County Courthouse that characterized the political struggle of that era would have been possible, if the post office had not been located directly across the street. [11]

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted this 20th day of December, 1989.

FRANK M. DUNBAUGH
Attorney for the Amici Curiae

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11 The Post Office in Selma, with its federal courthouse, FBI office and Civil Rights Division office, stood directly across the street from the Dallas County Courthouse where black citizens were required to register to vote and which was the headquarters of the mounted posse of arch segregationist Sheriff Clark. See, United States v. Clark, 249 F. Supp. 720, 725-26 (S.D. Ala. 1965).

APPENDIX A

1990 BALLOT ACCESS HURDLES FOR A NEW PARTY CAND. FOR U.S. SENATE:

STATE	LEGAL REQUIREMENT	ELECTION CODE REFERENCE	REQUIRED	%
Ala	1% of 1986 gub vote	17-8-2.1	12,345	.52
Alas	1% of 1988 vote cast	15.25.160	2,032	.69
Az	1% of 1988 pres vote	16.341E	11,719	.65
Ark	3% of 1988 pres vote	3-113(1)	24,833	2.06
Cal	1% of 1986 vote cast	elec. code 6430(b) (reg.)	76,172	.54
Colo	number stated in law	1-4-801	1,000	.05
Ct	1% of 1986 vote for US Senate	9-453(d)	9,770	.54
Del	.05% of Dec. 1989 registration	Title 15, sec 3001 (reg.)	est.145	.05
Fla	3% of no. of reg. voters as of 1988	Title 9, sec 99.0955	181,421	3.00
Ga	1% of no. of reg. voters as of 1988	21-2-180	29,414	1.00
HI	1% of no. of reg. voters as of 1988	Title 2, 11-62	4,438	1.00
Id	2% of 1988 pres. vote	34-501(1)(c)(D)	8,180	1.43
Il	number stated in law	Ch. 46, sec. 10-2	25,000	.39
In	2% of 1986 sec of state vote	3-8-6-3	31,077	1.08
Io	number stated in law	Title 4, sec. 45.1	1,000	.06
Kan	2% of 1986 gub. vote	25-302a	16,813	1.33
Ky	number stated in law	Title 10, sec. 118.315(2)	5,000	.25
La	5% of no. of reg. voters, July 1990	Title 18, sec. 441 (reg.)	ea 109,000	5.00
Me	number stated in law	Title 21, sec. 494.5	4,000	.47
Md	3% of no. of reg. voters + 10,000	Art. 33, sec. 4B-1	est 79,300	3.43
Ma	2% of 1986 gub. vote	Chap. 53, sec. 6	33,682	1.03
Mi	1% of 1986 gub. vote	168.685	23,953	.40
Mn	number stated in law	204B.08	2,000	.08
Ms	just be organized	23-1-81(c)	0	.00
Mo	1% of 1988 gub. vote	Title 9, sec. 115.315	20,860	.71
Mt	5% of 1988 gub winner's vote	13-10-601(2)	9,531	1.89
Neb	1% of 1986 gub. vote	32-526	5,635	.63
Nev	3% of 1986 congress vote	Title 24, sec. 293.1715.2(c)	10,326	2.32
N H	number stated in law	Title 4, sec. 655:42	3,000	.46
N J	number stated in law	19:13-5	800	.02
N M	1/2 of 1% of 1988 pres. vote	1-8-2.B & 1-7-2.A	2,607	.39
N Y	number stated in law	Chap. 17, sec. 6-142	20,000	.23
N C	2% of 1988 gub. vote	163-96(2)	43,601	1.27
N D	number stated in law	16.1-11-30	7,000	1.40
Oh	1% of 1988 pres. vote	3517.01	43,934	.69
Ok	5% of 1988 pres. vote	Title 26, sec. 1-109	58,552	2.66
Ore	2.5% of no. of reg. voters, Apr.'90	Title 23, sec. 249.732	est 35,000	2.29
Pa	2% of 1989 judge winner's vote	Title 25, sec. 2911	est 26,000	.44
R I	number stated in law	17-14-7	1,000	.18
S C	number stated in law	7-9-10	10,000	.70
S D	1% of 1986 gub. vote	12-7-1	2,945	.67
Te	2.5% of 1986 gub. vote	2-104(27)(b)	30,259	1.25
Tx	1% of 1986 gub. vote	Elec. code 181.005	34,424	.42
Ut	number stated in law	20-3-38	300	.04
Vt	number stated in law	Title 17, sec. 2402(b)	1,000	.29
Va	one-half of 1% of reg voters, Jan '90	24.1-168	est 13,500	.50
Wa	1% of 1990 primary vote US Sen.	29.18.110 (primary votes)	est 7,000	.28
W V	1% of 1988 US Senate vote	3-5-23	6,346	.66
Wis	number stated in law	Title 2, sec. 8.20(4)	2,000	.06
Wy	number stated in law	22-4-301	8,000	3.54
DC	number stated in law	1-1312(b)(1)	3,000	1.00

"Requirement" is the number of signatures or registrants to get on the November ballot. Although not every state has a U.S. Senate election in 1990, any state could have one, due to a vacancy. The D.C. requirement is for Delegate to Congress. "%" means the requirement, divided by the number of registered voters as of fall 1988. All procedures permit the party listed on the ballot. Chart prepared Sept. 9, 1989 by Richard Winger, 2201 Baker St., San Francisco CA 94123, (415) 922-9779

APPENDIX B

1990 BALLOT ACCESS FOR AN INDEPENDENT CANDIDATE FOR U.S. SENATE:

STATE	LEGAL REQUIREMENT	ELECTION CODE REFERENCE	REQUIRED	%
Ala	1% of reg. voters as of April 1990	17-7-1(aX3)	est 25,000	.93
Alas	1% of 1988 vote cast	15.25.160	2,032	.69
Az	1% of 1988 pres vote	16.341E	11,719	.63
Ark	number stated in law	3-105	10,000	.83
Cal	1% of no. of reg. voters as of 1988	elec. code 6831	140,149	1.00
Colo	number stated in law	1-4-801	1,000	.05
Ct	1% of 1986 vote for US Senate	9-453(d)	9,770	.54
Del	1% of Dec. 1989 registration	Title 15, sec 3002	est 2,900	.90
Fla	3% of no. of reg. voters as of 1988	Title 9, sec 99.096	181,421	3.00
Ga	1% of no. of reg. voters as of 1988	21-3-170(b)	29,414	1.00
Hi	10% of pri vote, 1990 + 25 sigs.	Title 2, 12-6 & 41 (pri votes)	est 25,000+	7.77
Id	number stated in law	34-708	1,000	.17
Il	number stated in law	Ch. 46, sec. 10-3	25,000	.39
In	2% of 1986 sec of state vote	3-8-6-3	31,077	1.08
Io	number stated in law	Title 4, sec. 45.1	1,000	.06
Kan	number stated in law	25-303	2,500	.20
Ky	number stated in law	Title 10, sec. 118.315(2)	5,000	.25
La	just pay $400; no petition needed	Title 18, sec. 464.B(1)	0	.00
Me	number stated in law	Title 21, sec. 494.5	4,000	.47
Md	3% of no. of reg. voters	Art. 33, sec. 4B-1	est 69,300	3.00
Ma	2% of 1986 gub. vote	Chap. 53, sec. 6	33,682	1.03
Mi	1% of 1986 gub. vote	168.590b(2)	23,953	.40
Mn	number stated in law	204B.08	2,000	.08
Ms	number stated in law	23-5-134	1,000	.06
Mo	1% of 1988 gub. vote	Title 9, sec. 115.321	20,860	.71
Mt	5% of 1984 Senate winner's vote	13-10-502(2)	10,786	2.13
Neb	number stated in law	32-504(2)(c)	2,500	.28
Nev	3% of 1988 vote cast	Title 24, sec. 293.200	10,628	2.39
N H	number stated in law	Title 4, sec. 655:42	3,000	.46
N J	number stated in law	19:13-5	800	.02
N M	5% of 1986 gub vote	1-8-51	19,742	2.93
N Y	number stated in law	Chap. 17, sec. 6-142	20,000	.23
N C	2% of reg. voters as of April 1988	163-122	est 66,000	1.92
N D	number stated in law	16.1-11-30	1,000	.20
Oh	number stated in law	3513.257	5,000	.08
Ok	just pay $1000; no petition needed	Title 26, sec. 5-112 & 6-106	0	.00
Ore	3% of 1988 pres. vote	Title 23, sec. 249.740	35,932	2.35
Pa	2% of 1989 judge winner's vote	Title 25, sec. 2911	est 26,000	.44
R I	number stated in law	17-14-7	1,000	.18
S C	number stated in law	7-11-70	10,000	.70
S D	1% of 1986 gub. vote	12-7-1	2,945	.67
Te	number stated in law	3-505	25	.0+
Tx	1% of 1986 gub. vote	Elec. code 142.007	34,424	.42
Ut	number stated in law	20-3-38	300	.04
Vt	number stated in law	Title 17, sec. 2402(b)	1,000	.29
Va	one-half of 1% of reg voters, Jan '90	24.1-168	est 13,500	.50
Wa	1% of 1990 primary vote US Sen.	29.18.110 (primary votes)	est 7,000	.28
W V	1% of 1988 US Senate vote	3-5-23	6,346	.66
Wis	number stated in law	Title 2, sec. 8.20(4)	2,000	.06
Wy	5% of 1988 congress vote	22-5-304	8,883	3.93
DC	number stated in law	1-1312(JX1)	3,000	1.00

"Requirement" is the number of signatures to get on the November ballot. Although not every state has a U.S. Senate election in 1990, any state could have one, due to a vacancy. The D.C. requirement is for Delegate to Congress. "%" means the requirement, divided by the number of registered voters as of fall 1988. Chart prepared Sep. 9, 1989 by Richard Winger, 3301 Baker St., San Francisco CA 94123, (415) 922-9779.

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